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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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Finance Docket No. 35239

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**ALLEGHENY VALLEY RAILROAD COMPANY  
PETITION FOR DECLARATORY ORDER**

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MAY 26 2011

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Public Record

**THE BUNCHE COMPANY'S  
REPLY TO ALLEGHENY VALLEY RAILROAD  
COMPANY'S STATEMENT OF FACTS  
AND ARGUMENTS-REMANDED PROCEEDING**

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**ATTORNEYS FOR  
THE BUNCHE COMPANY**

Dated: May 26, 2011

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**I. INTRODUCTION**

Pursuant to the Decision dated March 21, 2011 issued by the Surface Transportation Board ("STB" or "Board"), the Buncher Company ("Buncher") submits this Reply to Allegheny Valley Railroad Company's ("AVRC") submission entitled Statement of Facts and Arguments - Remanded Proceeding ("AVRC's Submission"). Sometimes an adversary's submission proves a litigant's point more ably than the litigant did and that is the case with AVRC's latest submission to the STB in this proceeding. AVRC's Submission demonstrates, first, that after two years of extensive briefing and review of innumerable maps, drawings, exhibits and other historical documents, there remains at the core of this case a basic question regarding the nature of the property that Consolidated Rail Corporation ("Conrail") acquired originally and then later transferred to Buncher and AVRC. This core question requires consideration of the original

Conrail conveyance documents and the Final System Plan. As Buncher has contended, this means that under the decision in Consolidated Rail Corp. v. Surface Transportation Board, 571 F.3d 13 (D.C. Cir. 2009) (Harsimus), exclusive jurisdiction over this matter rests with the Special Court formed under the Regional Rail Reorganization Act and the Board does not have jurisdiction over this matter. AVRC's Submission also proves, however, that whether the track once located on Buncher's property over which AVRC asserts a rail easement was part of a rail line or was a spur or industrial track, Conrail intended to abandon that track and did so many years before AVRC acquired any rights from Conrail. Therefore, even if the Board concludes that it does have jurisdiction to decide this matter, it must conclude that the track in question has been abandoned by Conrail and AVRC has no right to a rail easement over Buncher's property.

A. AVRC's Submission Reconfirms that This Case Requires Consideration of the Original Conrail Conveyance Documents and Under *Harsimus* Exclusive Jurisdiction Rests with the Special Court.

The first several sections of AVRC's Submission under "Legal Argument - Remanded Proceeding" are all devoted to the status of the track that once crossed Buncher's property, which is referred to as "Track No. 8". Because AVRC claims that it holds a continuing easement, it is required to argue that Track No. 8 was a "railroad line" that has never been abandoned. Putting aside the questionable foundation for AVRC's assertions or (as discussed below) the fact that the documents referenced in AVRC's own submission clearly show an abandonment, AVRC's arguments themselves demonstrate that there is still a fundamental issue in this case regarding the nature of the track acquired by Conrail, which Harsimus directs to the exclusive jurisdiction of the Special Court. AVRC attempts to "put the rabbit in the hat" by self-declaring that because it is correct in its contention that Track No. 8 is part of a "railroad line," this Board can accept

AVRC's answer to the question and ignore the initial, threshold question regarding the status of the track that is committed to the exclusive jurisdiction of the Special Court. AVRC's argument proves the presence of the issue and Harsimus makes clear that the issue, when present, is to be judicially adjudicated by the Special Court.

B. If the Board Does Decide to Exercise Jurisdiction, the Petition Must be Denied Because the Evidence, Plainly Shown on the Documents, Is that Conrail Did Abandon the "Valley Industrial Track" Located on Buncher's Property.

AVRC must, of course, argue not only that this Board should ignore Harsimus and assume that Conrail acquired a "railroad line" that crossed the property transferred to Buncher, but AVRC must also argue that that "railroad line" was never abandoned. Here again, however, because of the relentless nature of irrefutable facts, AVRC's argument well proves the opposite. AVRC first faces, of course, the following two plain facts, both readily discernable from a straightforward reading of the documents: (1) that what Conrail reserved in the 1983 Deed to Buncher was an easement over the "so-called Valley Industrial Track" (also referred to Track No. 8); and (2) that subsequent to the delivery of the 1983 Deed, Conrail filed an application (later granted by the ICC) for abandonment of the "Valley Industrial Track" between 11<sup>th</sup> Street and 21<sup>st</sup> Street located at MP 0.00 to MP 0.66, an area that encompassed Buncher's property located between 16<sup>th</sup> Street and 21<sup>st</sup> Street. Both the 1983 Deed and the abandonment application filed by Conrail in February 1984 ("the "February 1984 Abandonment Application") use the same phrase, "Valley Industrial Track", and both reference an area that includes 16<sup>th</sup> Street to 21<sup>st</sup> Street. A straightforward reading of these documents shows a subsequent abandonment by Conrail of the very easement right that was reserved in the 1983 Deed.

AVRC's first response to these elementary facts, in the earlier proceedings before the Board, was to suggest that Conrail had acquired two separate railroad lines in this same area, that both had come to be named the "Valley Industrial Track" and that the February 1984 Abandonment Application actually applied to track located in Smallman Street, not the area encompassing Buncher's property. Before the Board, however, is the additional evidence submitted by Buncher, consisting of three abandonment applications that completely destroy AVRC's earlier theory since these three abandonment applications, filed shortly after the February 1984 Abandonment Application, specifically reference "Smallman Street" and directly apply to the area which AVRC previously, and incorrectly, asserted was covered by the February 1984 Abandonment Application that referenced the "Valley Industrial Track."

Undaunted by this exposure of its earlier error, AVRC persists in arguing that the February 1984 Abandonment Application does not apply to Buncher's property but AVRC now expands its error by adopting two new fallacies. The first is that the three abandonment applications presented as additional evidence and the February 1984 Abandonment Application all relate to Smallman Street. Though AVRC tries to manufacture that proposition into a fact just by declaring it to be so, once again the plain, straightforward facts get in the way. Thus, AVRC contends that all four abandonment applications apply to Smallman Street even though the three abandonment applications presented as additional evidence all specifically say "Smallman Street" and the February 1984 Abandonment Application does not. AVRC further persists in this argument even though it had previously argued that Conrail referred to track in Smallman Street as the "Valley Industrial Track" and the three abandonment applications clearly show that Conrail did not refer to track in Smallman Street as "Valley Industrial Track" when filing abandonment applications, and in fact show that when Conrail referred to track in Smallman Street, it called it "Smallman Street" track.

AVRC also persists in this argument even though the observable facts revealed by the abandonment applications themselves show that the three abandonment applications submitted as additional evidence, together, cover from 11<sup>th</sup> Street to 24<sup>th</sup> Street between MP 0.00 and MP 0.85 and the February 1984 Abandonment Application covers from 11<sup>th</sup> Street to 21<sup>st</sup> Street between MP 0.00 and MP 0.66. If all four applications were in fact covering track in Smallman Street, as AVRC contends, then the abandonment applications would be overlapping, duplicative and unnecessary. The far simpler and obvious conclusion to draw from the abandonment applications is that the three abandonment applications presented as additional evidence related to Smallman Street (as the abandonment applications themselves read) and the February 1984 Abandonment Application applied to the “Valley Industrial Track,” as it reads, and that is the same track referred to as the “Valley Industrial Track” in the 1983 Deed to Buncher.

As it did before when it concocted the “two line theory” to try to counter the plain impact of the February 1984 Abandonment Application, AVRC once again spins a recount of history “according to AVRC” that in the end is unsustainable and proves the opposite. AVRC’s newest theory is that the abandonment applications filed by Conrail were all part of Conrail’s “rationalization” of its use of the Strip District in light of the construction of I-579. Critical to AVRC’s argument is its assertion that Conrail and the City of Pittsburgh had discussions (AVRC calls them “negotiations”) about continuing service to the Produce Terminal Building (originally the Fruit Auction House) and the suggestion that Conrail made a “commitment” to continue service to the building with track located to the north of the building.<sup>1</sup> AVRC’s attempted suggestion here is that the track to the north by which Conrail might have continued service to the Produce Terminal Building is Track No. 8 that was located on Buncher’s property. The very

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<sup>1</sup> There is no evidence Conrail made such a commitment. As discussed below, in the letter cited by AVRC, Conrail committed to “delay” filing of the three Smallman Street applications. AVRC inaccurately tries to stretch that into a commitment to continue service to the Produce Terminal Building.

documents AVRC relies on, however, plainly show that this is not the case. AVRC relies on correspondence (two letters) exchanged between Conrail and the City of Pittsburgh in January and February 1984. The subject of the letters is Conrail's proposed abandonment of trackage along Smallman Street. Mayor Richard Caliguiri's letter dated January 20, 1984 refers to "the process of abandoning trackage along Smallman Street." Conrail's reply dated February 7, 1984 refers to "Conrail's potential abandonment of our Smallman Street track". The letter from Conrail discusses a "commitment" to delay the filing of the Smallman Street abandonment applications until March 1. Clearly this did not apply to the February 1984 Abandonment Application covering the "Valley Industrial Track" which had already been filed. What the City and Conrail were clearly discussing were the Smallman Street abandonment applications that were eventually filed in May and June 1984. These are the three abandonment applications that were submitted as additional evidence by Buncher.<sup>2</sup>

What the documents show, including the documents submitted as part of the additional evidence, is that while Conrail may have considered alternatives by which service might have been maintained to the Produce Terminal Building, none of those alternatives included using the Valley Industrial Track that crossed the property transferred to Buncher. Documents of record in this proceeding plainly show that the track to the north that Conrail considered using as an alternative means of providing service to the Produce Terminal Building was not the track located on Buncher's property. Attached hereto as Exhibit A is a copy of a track drawing dated October 1993 that had also been previously submitted by AVRC. (See AVRC Submission, Ex.

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<sup>2</sup> Realizing this circumstance, AVRC tries later in its Submission to argue that the three Smallman Street abandonment applications "superseded" the earlier February 1984 Abandonment Application that referenced the "Valley Industrial Track." Other than this assertion by AVRC, which it is forced to say by the weaknesses of its argument, there is no support whatsoever for this theory. There is no mention in the contemporaneous Conrail documentation (including the letters exchanged with the City of Pittsburgh and the internal Williams memo from 1984) or in the three Smallman Street abandonment applications themselves that the earlier Conrail abandonment application in Sub-No. 558 (the February 1984 Abandonment Applications) had been superseded, withdrawn or overridden by the Smallman Street abandonments.

J; AVRC Petition for Declaratory Order dated April 16, 2009, Ex. H). The drawing shows that Track No. 6 (labeled "702"), Track No. 7 (labeled "701") and the Valley Industrial Track - Track No. 8 (labeled "208") all stop at 21<sup>st</sup> Street. Track No. 6, Track No. 7 and Track No. 8 (a/k/a "Valley Industrial Track") are the three tracks that were identified in the 1983 Deed to Buncher. The one track that is shown on the drawing extending to the immediate north of the Produce Terminal Building is Track No. 3 (labeled "703").<sup>3</sup> Track No. 3 (labeled "703"), however, was not located on Buncher's property and clearly indicates that Conrail's consideration of possible alternatives for providing service to the Produce Terminal Building did not include use of Track No. 6, Track No. 7 or Track No. 8, the only three tracks once located on Buncher's property.

This irrefutable fact is shown consistently in numerous documents that are of record in this case. Thus, attached hereto as Exhibit B is a copy of the drawing prepared by Conrail when it offered Buncher the property that was acquired by Buncher in the 1983 Deed. (See Buncher Motion to File Supplemental Evidence dated August 4, 2009 at Ex. A.) The drawing shows that the area to be sold includes the Valley Industrial Track (Track No. 8), Track No. 7 and Track No. 6. It also shows other tracks located to the north of the Produce Terminal Building but south of the property transferred to Buncher. These same facts are also cogently and irrefutably demonstrated by the drawing attached hereto as Exhibit C. This drawing was attached to the May 1984 Memorandum from G.M. Williams, Jr. discussing alternatives for providing service to the Produce Terminal Building (see AVRC Submission, Ex. F). It shows that Conrail considered the option of operating over a spur track to the immediate north of the Produce Terminal Building (the track identified as Track No. 3 in Exhibit A hereto). It also shows that Conrail

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<sup>3</sup> AVRC is well aware that "Track 703" was the track to the immediate north of the Produce Building, having said so in earlier submissions. See AVRC's Reply dated July 15, 2009, Legal Argument at p. 3. It seems reasonable that to the extent Conrail considered the options, it would use track closer to the Produce Terminal Building (*i.e.*, Track 703) to provide continuing service to the facility (and not Track No. 8 on property farther north which it had sold to a third party).



never changed its intention to abandon the portion of the Valley Industrial Track located on Buncher's property. As the legend to the drawing states, the areas cross-hatched are areas for abandonment and the cross-hatching expressly includes the "Valley Industrial Track" to the north of the Produce Terminal Building that was once located on Buncher's property. This drawing confirms the intention of Conrail to abandon the "Valley Industrial Track" between Mile Post 0.00 and Mile Post 0.66, precisely what was contained in the February 1984 Abandonment Application.<sup>4</sup>

Lastly, AVRC argues that the February 1984 Abandonment Application could not apply to the "Valley Industrial Track" on Buncher's property because the application references connection to the Fort Wayne Bridge and, as of February 1984, the track in place no longer connected to the lower deck of the Fort Wayne Bridge. This, like others, is one of AVRC's self-supported historical "facts." AVRC has not submitted any independent evidence to support this claim. In addition, as AVRC itself has pointed out, the presence or absence of track in place is not determinative of an intention to abandon (see AVRC's Rebuttal dated June 11, 2001 at p. 21), and in order to achieve full abandonment, Conrail could have sought an abandonment of the "rail line" as described in the February 1984 Abandonment Application regardless of whether the track in place remained connected to the Fort Wayne Bridge. That argument, moreover, brings us full circle to Harsimus since here again the February 1984 Abandonment Application is best

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<sup>4</sup> While AVRC has attempted to offer the verified statement of G.M. Williams in support of AVRC's theory, Mr. Williams admits in his statement, as he must, that "after 27 years, I do not recall all the details of our negotiations with the City of Pittsburgh." (Verified Statement of G.M. Williams at p. 4). The contemporaneous documents authored by Mr. Williams in 1984 are just not consistent with AVRC's theory. In fact, Exhibit K to the G.M. Williams Verified Statement contains a Conrail track chart for the Valley Industrial Track from 1986 that shows the Valley Industrial Track ending at 21<sup>st</sup> Street (milepost 0.6) and no longer including the segment between 16<sup>th</sup> and 21<sup>st</sup> Street (milepost 0.3 to milepost 0.60). The legend at the bottom of the track chart refers to Line Code 2220 and describes the length of the Valley Industrial Track as follows: "MP 0.60 - MP 4.70." This Conrail chart confirms abandonment of the portion of the Valley Industrial Track on Buncher's property (between MP 0.3 and MP 0.6) by 1986 and eviscerates AVRC's latest theory that the February 1984 Abandonment Application in Sub-No. 558N was somehow superseded by the Smallman Street track abandonments.

understood once it is first determined what Conrail did or did not acquire in the original conveyance documents.<sup>5</sup>

In short, AVRC's Submission proves too much. It proves that there remains a basic question in this case regarding the status of the track originally acquired by Conrail that is committed by the Harsimus decision to the exclusive jurisdiction of the Special Court. It proves as well that if this Board should nevertheless decide to consider this matter, the only consistent, cogent conclusion that can be reached is that the February 1984 Abandonment Application applied to the "Valley Industrial Track" as located on Buncher's property and therefore any easement that had been reserved by Conrail was abandoned and AVRC acquired no rights to any rail easement on Buncher's property by its 1995 Deed.<sup>6</sup>

### CONCLUSION

For the reasons set forth above, Buncher respectfully requests the Board issue an order determining that the Board has no jurisdiction over AVRC's Petition or, alternatively, declaring

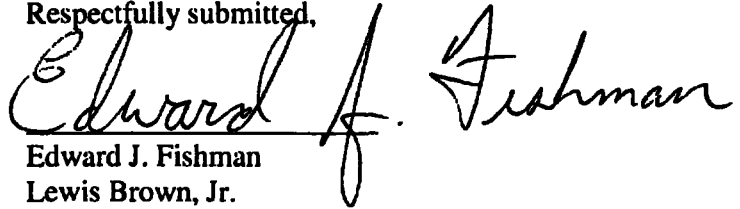
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<sup>5</sup> AVRC also reasserts an argument that Buncher is some how estopped by its failure to have objected in 1995 to AVRC's Notice of Exemption filed with the ICC. AVRC again fails to mention that the drawing attached to the Notice of Exemption as filed by AVRC in 1995 specifically states that the "line dead-ends at 21<sup>st</sup> Street, Pittsburgh" which means it ends before reaching Buncher's property (consistent with abandonment) and, as described, would have given Buncher no reason to object. As the Board itself noted earlier in the proceedings, there is also no evidence that Buncher ever received notice of the filing of the Notice of Exemption. (Trans. of Oral Argument, Jan. 26, 2010 at pp. 43-44; 48-49.)

<sup>6</sup> While AVRC attacks Buncher for being "unknowledgeable" about railroad operations and practices, Buncher makes no apologies for its ability to read. The documents attached hereto speak for themselves. As to the other matters raised by AVRC (some are raised for the first time in these proceedings and some are wholly irrelevant attacks on "motives and objectives"), the only one worth mentioning here is AVRC's criticism of Buncher's citation to Pennsylvania property law regarding the status of "quit claim" deeds and why no evidentiary conclusion can be drawn by the Board from the 1995 quit claim deed regarding Conrail's intent with respect to the status of any title. Here once again, AVRC makes the point better than Buncher did. AVRC points out that railroads "had the practice of conveying rights of way by quit claim deed because of the extensive number of and the varied quality of title to parcels comprising a railroad right-of-way." (AVRC Submission - Legal Argument at pp. 12-13.) Buncher's response is "precisely". What AVRC is saying is that railroads intentionally made beneficial use of the Pennsylvania law that a quit claim deed constitutes no representation by the grantor of the state of the title. AVRC has just added that railroads did that because they themselves were often unsure of the "varied quality of title" to their parcels.

that AVRC does not have an active rail easement over Buncher's property and denying the Petition.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Edward J. Fishman". The signature is written in a cursive style with a large, stylized "E" and "F".

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Date: May 26, 2011

# **Exhibit A**

03

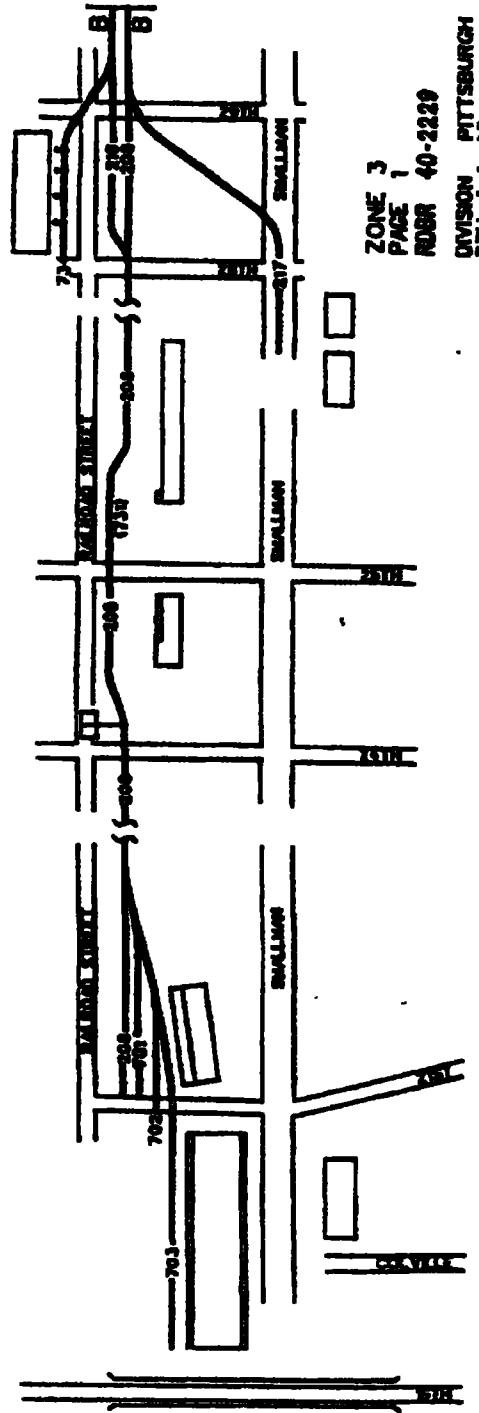
Rev 10/15/93

PAGE 1

03 208 00 00 Valley - Ind. Tr. 88  
03 216 00 00 Ind. Land - Tr.  
03 217 00 00 Swallow St. Land Tr.  
03 701 99 99 House - Tr. 87 - (Fruit Auction)  
03 702 97 97 House - Tr. 86 - (Team Track)  
03 703 99 99 House - Tr. 83 - (Fruit Auction)  
03 731 01 01 J.S. McCormick (Leased 50') Tr.  
03 734 01 01 Georgia Pacific Corp. Tr.

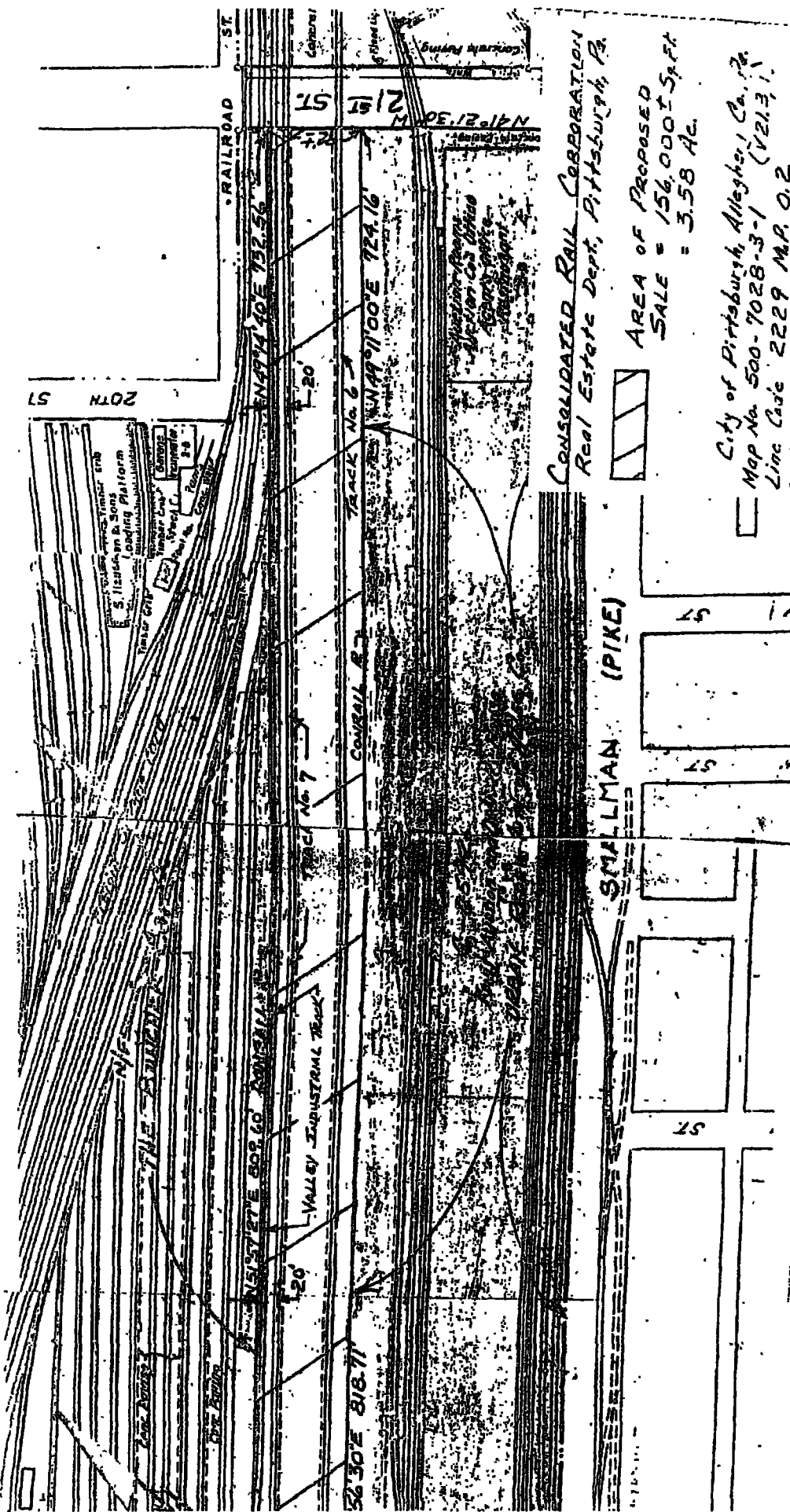
PITTSBURGH PA

TO VERONA  
SET 3  
PAGE 2



ZONE 3  
PAGE 1  
RDBR 40-2229  
DIVISION PITTSBURGH

# **Exhibit B**



CONSOLIDATED RAIL CORPORATION  
Real Estate Dept, Pittsburgh, Pa.

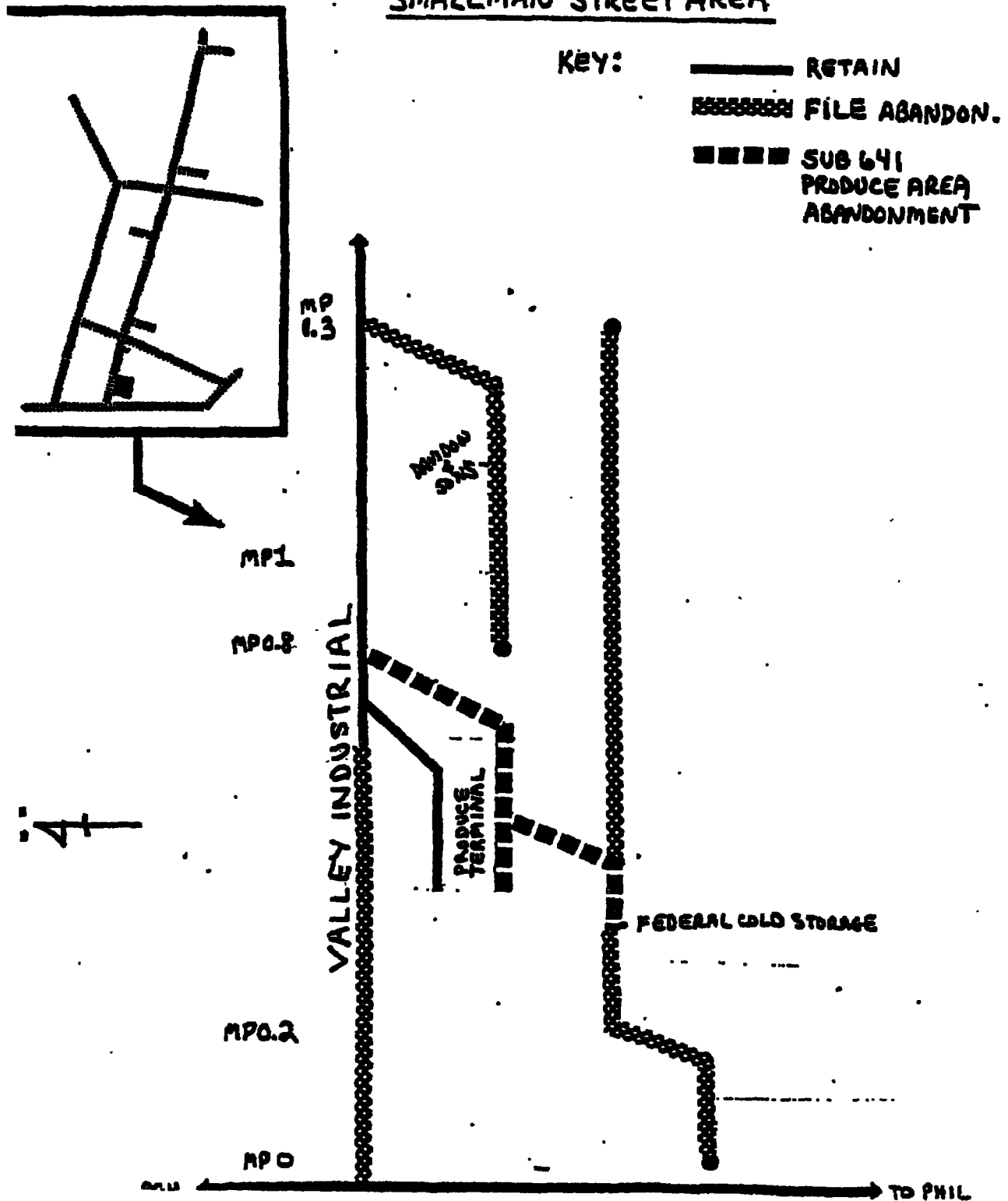
AREA OF PROPOSED  
SALE = 156,000 ± Sq. Ft.  
= 3.58 AC.

City of Pittsburgh, Allegheny Co., Pa.  
Map No. 500-7028-3-1 (V21.3.1)  
Line Code 2229 MAP 0.2

# **Exhibit C**



SMALLMAN STREET AREA.



**CERTIFICATE OF SERVICE**

I hereby certify that on May 26, 2011, I served a copy of the foregoing Reply by electronic mail on the counsel of record for each of the parties to this matter:

Richard R. Wilson  
Richard R. Wilson, PC  
518 N. Center Street, Ste. 1  
Ebensburg, PA 15931

/s/ Edward J. Fishman  
Edward J. Fishman